71-1617

Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

ROBERT A. SCHMITZ,

Petitioner,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. also known as INTERNATIONALE INDUSTRIE UND HANDELSBETEILIGUNGEN, A.G.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions	2
Jurisdiction	2
Question Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	14
I. Petitioner's motion for reconsideration, or alternatively, to open the judgment and take additional testimony, should have been granted	14
A. The Decision of the Trial Court, Affirmed by the Court of Appeals, that the Petitioner is Entitled to Relief under either Implied Contract or Quasi-Contract and in Either Case He had Shown that He is Entitled to Reasonable Compensation for his Services, but Nevertheless Judgment Should be Entered for Defendant, is Inconsistent and Erroneous	14
B. The Petitioner Should Have Been Allowed to Submit Additional Proof as to the Amount of Damages	16
Conclusion	18
Appendix	19

Cases Cited

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 220	15
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359	15

PAGE

General Finance Corp. v. *Dillon*, 172 F 2d 924 15

Hetzel v. *Baltimore & Ohio Railroad Company*, 169 U.S. 26 15

International Terminal Operating Co. v. *N. V. Nedrl. Amerik*, 393 U.S. 74 18

Kaufman v. *Societe Internationale etc.*, 343 U.S. 156 5

Kelberine v. *Societe Internationale etc.*, 124 U. S. App. D.C. 257, 261-262, 363 F. 2d 989, 993-994, certiorari denied 385 U.S. 989 (No. 539) 4

Societe Internationale etc. v. *Brownell*, 96 U.S. App. D. C. 232, 225 F. 2d 532, certiorari denied 350 U.S. 937 5

Societe Internationale etc. v. *Clark*, Civil Action, U.S. District Court for the District of Columbia, No. 4360-48 4,5

Societe Internationale etc. v. *McGrath*, 86 U.S. App. D. C. 157, 180 F. 2d 406 5

Societe Internationale v. *Rogers*, 357 U.S. 197 5

Specialty Assembling & Packing Co. v. *United States*, 355 F 2d 554 16

STATUTES

28 U.S.C. Sec. 1254(1) 2

Amendment V of the United States Constitution 3

Rule 59(a), Federal Rules of Civil Procedure 3,16

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Petitioner, Robert A. Schmitz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 15, 1972, motion for reconsideration by the Court of Appeals denied by order entered March 15, 1972. Such judgment of the Court of Appeals affirmed the judgment of the United States District Court for the District of Columbia, entered on May 15, 1970, for the defendant, and the order of the United States District Court for the District of Columbia, entered on July 1, 1970, which denied plaintiff's motion for reconsideration or, alternatively, to open the judgment and take additional testimony.[1]

[1] Although the notice of appeal to the Court of Appeals expressly included both appeal from the judgment of May 15, 1970 and the order of July 1, 1970 denying the later motion for reconsideration or to open the judgment and take additional testimony, the judgment of affirmance of the Court of Appeals refers only to the *judgment* of the District Court and makes no mention of the *order* of denial of the later motion.

Opinions

No opinion was delivered by the Court of Appeals in affirming the judgment of the District Court or in denying the motion for reconsideration.

District Judge McGarraghy of the United States District Court for the District of Columbia, in finding for the defendant after trial without a jury, delivered an opinion, which has not been reported. A copy of such opinion is appended.

No opinion was delivered by the District Judge when he denied the motion for a reconsideration or, alternatively, to open the judgment and take additional testimony.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 15, 1972, motion for reconsideration denied by order entered on March 15, 1972, affirmed a final judgment of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254(1).

Question Presented for Review

Whether the United States District Court in a suit tried without a jury, after having found that petitioner (plaintiff) was entitled to recover from respondent (defendant) reasonable compensation for services rendered by him to respondent and then having given judgment for respondent on the basis that there was no evidence as to the reasonable value of petitioner's services, properly denied petitioner's motion for reconsideration or, alternatively, to open the judgment and take additional testimony.

Constitutional Provisions and Statutes Involved

Amendment V of the United States Constitution, in part, provides:

> "No person . . . shall be deprived of . . . property, without due process of law; . . ."

Rule 59(a), Federal Rules of Civil Procedure.

> Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Statement of the Case

Petitioner brought the instant suit[1] in the United States District Court for the District of Columbia against respondent, commonly known as Interhandel, a corporation of the

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[1] Petitioner had first instituted a suit in the United States District Court for the District of Columbia, Civil Suit No. 1900-65, against the respondent herein and joining as a defendant Henry H. Fowler, Secretary of the Treasury. The complaint was dismissed on the grounds of sovereign immunity of the United States, 249 F. Supp. 757, affirmed U.S. Court of Appeals for the District of Columbia Circuit, certiorari denied, 387 U.S. 908. Thereafter the instant suit was brought against respondent alone.

Conferation of Switzerland, claiming an equitable lien upon a fund of approximately $121,000,000 which had been deposited in the Treasury of the United States for the credit of, and in the name of, respondent under settlement of Civil Action No. 4360-48 in the United States District Court for the District of Columbia by the respondent against the Attorney General of the United States as successor to the Alien Property Custodian. Petitioner claimed an equitable lien upon the fund for services performed by him in the employ of respondent as its agent in the creation and preservation of the fund.

The District Court for the District of Columbia had jurisdiction of this case by reason of the provisions of Section 11-521 of the District of Columbia Code (1961 ed. Supp. V), the general equity powers *in rem* over a fund within the District of Columbia, and personal jurisdiction over John J. Wilson, the agent of defendant, such personal jurisdiction having been established under the ruling in *Kelberine* v. *Societe Internationale etc.*, 124 U.S. App. D.C. 257, 261-262, 363 F. 2d 989, 993-994, certiorari denied 385 U. S. 989 (No. 539).

The fund was derived from the sale to the public of 11,166,488 shares of General Aniline and Film Corporation, an American corporation, known as GAF, being approximately 90% of the outstanding stock of GAF and representing the stock of that company that was originally owned and controlled by respondent from its incorporation until 1942. On February 16, 1942 the Secretary of the Treasury of the United States had issued a Vesting Order under the Trading with the Enemy Act, seizing these shares as the property of an allegedly enemy-owned corporation. The United States Government had steadfastly refused during and after the war to return this stock to respondent. Although suit had been brought against the United States in 1948 by the respondent for the return of the vested GAF shares (*Societe Internationale etc.* v. *Clark,* Civil

Action, U.S. District Court for the District of Columbia, No. 4360-48; intervention allowed, *Kaufman* v. *Societe Internationale etc.*, 343 U.S. 156; see also, *Societe Internationale etc.* v. *McGrath*, 86 U.S. App. D. C. 157, 180 F 2d 406 and *Societe Internationale etc.* v. *Brownell*, 96 U.S. App. D. C. 232, 225 F 2d 532, certiorari denied 350 U.S. 937), the Government had resisted the action strenuously. Even after the decision of this court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, the time when the dispute would be resolved remained far in the future and the mode and substance of the ultimate resolution of the controversy continued to be in doubt.

The complaint in the within suit is for compensation for services rendered by petitioner to respondent from 1958 to 1960 in procuring Mr. Charles E. Wilson to represent respondent as attorney-in-fact and trustee under an irrevocable power of attorney with broad powers to negotiate with the United States government and settle the dispute concerning GAF and respondent's interest therein. Recovery was sought on an alleged express oral contract whereby petitioner would be paid five per cent of any monies which respondent received in settlement of its dispute with the United States government, or for equitable relief through the imposition of an equitable lien on the fund in the sum of $121,000,000 which respondent ultimately received for its GAF stock.

The case came on for trial before District Judge Joseph C. McGarraghy, the parties having waived a jury, who handed down a written decision directing judgment for defendant. The opinion, constituting the court's findings of fact and conclusions of law, is appended to this petition.

The basic facts in the case, as found by the court, are stated in the opinion of Judge McGarraghy, particularly in the portions of the opinion which are headed "Historical Background" and "Background of Plaintiff". These facts may be summarized and restated as follows, in the

form of the allegations of the complaint as admitted by respondent in its answer or by stipulation, or as found by the court in its opinion, or, while not expressly admitted by respondent or stated as findings in the court's opinion, as proven on the trial and not controverted by any testimony or other proof.

For many years the petitioner had been intimately acquainted with the affairs of GAF and its relationship to respondent. His father, Dietrich A. Schmitz, now deceased, was president and chairman of the board of directors of GAF from its inception in 1939 until its vesting by the United States government in 1942. Dietrich A. Schmitz also had served as the principal officer of GAF's predecessor corporation, which also was owned by respondent. Over the years petitioner acquired an intimate knowledge of the complicated relationship between respondent and its owners and managers, and he also earned the friendship and trust of the said owners and managers, particularly of Dr. Hans Sturzenegger, the principal stockholder. The officers of respondent had come to rely on plaintiff's knowledge of the intricacies and vagaries of American policies and of the personalities of key American officials, especially as they related to the varying hopes and fears of the Swiss owners of GAF and the prospects of salvaging their enormous investment in respondent's United States subsidiary, General Analine and Film Corporation.

A number of American corporations sought to buy respondent's interest in GAF not only because it was a valuable property, but also because they judged that an American corporation would be in a better position than a foreign corporation to obtain the return of the seized stock. Respondent gave serious consideration to various proposals. From 1947 through 1958, petitioner was, with the consent and encouragement of the respondent, successively authorized to act, and did act, on behalf of Reming-

ton Rand, Inc., Atlas Corporation, Shields and Co., W. R. Grace and Co., and Food Machinery and Chemical Corporation, and, in anticipation of the receipt of substantial fees and commissions, expended a great deal of time, money and effort to bring about such a purchase.

In December 1958, while petitioner was in Switzerland carrying on negotiations between Food Machinery and Chemical Corporation and respondent, he was told by the aforementioned Dr. Hans Sturzenegger that respondent had finally determined not to sell its interest in GAF until it had brought to a conclusion its claim against the United States government. Because the civil action brought by respondent in the District Court for the District of Columbia, hereinabove referred to, seemed endless and because it felt that the handling of its claim had blackened its image and prejudiced its interests, respondent decided that it would itself negotiate with the United States government for the return of its GAF stock or for compensation, through an agent of its own choosing. Such agent would have to be of the highest standing and reputation. Petitioner's cooperation in effecting these arrangements was solicited by respondent.

Petitioner suggested the name of Charles E. Wilson, formerly president of the General Electric Company, as a possible agent to conduct these negotiations. He had been a high government official, executive vice-chairman of the War Production Board in World War II and Defense Mobilizer during the Korean conflict, and was then serving as president of the People to People Foundation, to which position he had been appointed by President Eisenhower. Petitioner was personally acquainted with Mr. Wilson and suggested his name as respondent's representative because Mr. Wilson enjoyed the confidence and respect of prominent United States officials and could therefore negotiate at the highest levels of government. After several conferences with Mr. Wilson, petitioner reported to respondent that

Mr. Wilson could be persuaded to act only if he were offered full powers as trustee to negotiate a settlement of the dispute upon such terms and conditions as would appear honorable and just to him. It was urged that the trusteeship would afford respondent complete protection and full accounting of the trustee's transactions and such powers would be terminable only upon the achievement of the objective. Petitioner's suggestion was accepted and he was asked to bring about the trusteeship of Mr. Wilson.

During these same meetings with Dr. Sturzenegger and other agents of respondent in December 1958, petitioner pointed out that adoption of this new approach would disable him from earning the fees and commissions on the sale of respondent's interest for which he had worked so hard for so many years; that bringing about the Wilson trusteeship would be of great value and importance to respondent, and that it would take much time, travel and effort to give Mr. Wilson the necessary background to persuade him that respondent's cause was just, and to induce him to undertake the trusteeship.

Petitioner then proceeded with his efforts to bring about the trusteeship of Mr. Wilson. From the end of November 1958 until May 23, 1960, when Mr. Wilson accepted the trust powers—a period of 18 months—petitioner devoted almost all of his time, attention and his own money resources, as well as much travel, to bring about the desired result. This entailed three trips to Switzerland by petitioner to confer with officials of respondent and respondent sent its representatives to New York three times to confer with petitioner and Mr. Wilson. In confirmation that petitioner was acting for respondent as its authorized agent in these negotiations, respondent, in May of 1960, reimbursed petitioner $13,733 for out-of-pocket expenses previously incurred. Petitioner's task was difficult. Among other things, it was necessary for petitioner to accomplish the following: (a) to provide the essential background to

persuade Mr. Wilson of the merits of respondent's position in the dispute; (b) to convince him of the good faith and integrity of respondent's management; (c) to induce him to accept the feasibility of the trust approach; (d) to prevail upon him to commit his time, energy and reputation to the effort; (e) to bring him together with respondent's owners, managers and agents, in meetings in New York and Paris; (f) to maintain both confidence and contact between respondent and Mr. Wilson during the transfer in respondent's stock ownership and management; (g) to give body and substance to the trust idea; and (h) to draft a resolution of the executive committee of respondent's board of directors, an option contract, and a power of attorney acceptable in form and substance to both Mr. Wilson and respondent. Petitioner subsequently accomplished all these tasks.

Mr. Wilson agreed to serve as trustee and exercise his powers as such, because he was convinced that the respondent's cause was just and regarded the confiscation of GAF as contrary to the interests of the United States, illegal, immoral and unwise. It was through the efforts of petitioner that Mr. Wilson was so convinced. Mr. Wilson stated that he desired to receive no compensation for his services. On May 23, 1960, Mr. Wilson accepted the trust powers and petitioner promptly communicated to respondent by transatlantic telephone the news of the acceptance.

Upon the release of the news of the appointment of Mr. Wilson as trustee and attorney-in-fact for respondent, the price of respondent's stock on the Zurich Bourse jumped over 2,000 Swiss francs per share, or approximately 450 American dollars per share, so that with 110,000 shares of respondent's stock outstanding the value of Mr. Wilson's acceptance of the trusteeship, as appraised in the stock market, was approximately $55,000,000, and the ultimate amount received by respondent for its GAF stock was almost precisely the same as the price of the stock after Mr. Wilson's acceptance of the powers.

Following Mr. Wilson's acceptance of the trust powers and with respondent's continuous active cooperation, Mr. Wilson and his attorney, Mr. Charles M. Spofford, began the task of convincing the United States government, and specifically the Department of Justice, that this long, seemingly interminable, case should be settled out of court. Intensive negotiations were entered into with the highest officials of the United States government in an effort to convince them of the merits of respondent's claim and injustice of the government's resistance thereto.

The November, 1960, presidential election caused an inevitable break in the negotiations since insufficient time remained for the conclusion of any settlement with the outgoing Republican administration and serious negotiations could not be resumed until the new Democratic administration, specifically the new Justice Department, had familiarized itself with the case. Mr. Spofford, with the assistance of petitioner, prepared a detailed lengthy memorandum or brief, recounting the various steps that had taken place since the original vesting order and detailing the arguments in support of the return of the vested GAF stock to the respondent and settlement of the controversy and this memorandum was of invaluable assistance in acquainting the members of the new administration with the background of the entire affair and the reasons calling for an agreed disposition of the dispute.

In the latter part of 1961, while negotiations were proceeding with the government, despite the promise as expressed in the trust instrument or power of attorney that respondent would not deal in any way with the United States government concerning the claim except through the trustee, Dr. Albert Schaefer, then chairman of the board of respondent and acting on its behalf, secretly and without the knowledge of Mr. Wilson, entered into direct negotiations with the United States government concerning the settlement of its claim. This made the trustee's posi-

tion untenable. Besides being a violation of the exclusive irrevocable power of attorney, this action undercut the authority of the trustee, and Mr. Wilson thereupon undertook to withdraw from proceeding further in behalf of respondent.

A settlement was eventually made whereby the vested GAF stock would be sold to the general public with the net proceeds then divided 50% to the government and 50% to respondent, with various expenses and taxes to be paid from the respondent's share. The fund of approximately $121,000,000 which was eventually deposited in the United States Treasury for the account of the respondent, represented the net proceeds to the respondent.

The trial of the case, which was held before District Judge McGarraghy, without a jury, began January 5, 1970 with testimony concluded, after occasional interruptions and adjournments, on February 4, 1970. The transcript of the testimony and depositions comprises over 1,300 pages with an additional more than 600 pages of exhibits. The decision of the trial court is dated May 7, 1970.

Petitioner then moved for reconsideration, or, alternatively, to open the judgment and take additional testimony. The motion included the following:

> "7. If, however, the Court believes that actual proof of the value of services is necessary for recovery by the plaintiff, then the Court is requested to reopen the proceedings in accordance with the provisions of Rule 59 of the Federal Rules of Civil Procedure, to permit plaintiff to present evidence as to the value of the services performed by him.
>
> "Wherefore, the premises considered, plaintiff moves this Court to reconsider the decision heretofore reached in the instant case, or, alternatively, to open the judgment and take additional testimony."

This motion was argued and submitted on June 25, 1970. Submitted to the court at the time of argument was an affidavit by Charles E. Wilson reading as follows:

"AFFIDAVIT OF CHARLES E. WILSON.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

Personally appeared CHARLES E. WILSON, of 7 Hampton Road, Town of Scarsdale, Westchester County, New York, before me, who, being first duly sworn, deposes and says that:

On May 23, 1960, I accepted all of the duties and imperative mandates to act as sole Trustee under Powers in Trust for Societe Internationale Pour Participations Industrielles et Commerciales, S.A., also known as Interhandel. I became Trustee under the Resolutions and Powers conferred upon me by the above Interhandel, made part of one another, as ratified on April 28, 1960, at the office of Union Bank of Switzerland, Zurich, Switzerland, and which I accepted and acted upon, and which Resolutions coupled to my Powers expressed the intentions of the parties.

Thereunder, I was required by Interhandel to settle their action against the Attorney General of the United States, and solely to conclude any and all negotiations related to all of the property and business of Interhandel in the United States of America the subject matter of this action, and to convey their property to American purchasers with clear title.

I was required to discharge all claims and all liens outstanding, and that would include the equitable lien of Robert A. Schmitz of which I had knowledge. With that knowledge, and in order to carry out my mandate also con-

sistent with the added express oral understandings arrived at with Interhandel at Paris, France, on April 30, 1960, the fixation of fees including the fee of Mr. Robert A. Schmitz was in my sole discretion under my Powers in Trust. Ever since that point in time it has been and remains my firm judgment that the reasonable value of the said services of Mr. Robert A. Schmitz was not less than five percent (5%) of the sums recovered by Interhandel under the settlement, and I would have paid Mr. Schmitz not less than five percent out of the sums recovered as part of my obligation. Paragraphs 23 and 24 of the Resolutions part of my Powers are expressive of the intentions of Interhandel for me to effectively execute, and Paragraphs 2, 4, 5, and 6 of my specific Powers in Trust confirm my obligation.

CHARLES E. WILSON

Sworn to May 26, 1970''

The motion for reconsideration or to open the judgment was denied, without opinion, on June 30, 1970.

The appeal to the United States Court of Appeals for the District of Columbia Circuit was from both the judgment in favor of defendant (respondent) against the plaintiff (petitioner), entered on May 15, 1970, and also from the order denying the motion for reconsideration, or, alternatively, to open the judgment and take additional testimony.

The appeal was heard before a panel consisting of Circuit Judges Wright, Tamm and MacKinnon and the judgment of the District Court was unanimously affirmed without opinion except that the court stated that it was in agreement with the findings of fact and conclusions of law filed by the District Court. The judgment of affirmance makes no reference to the order of the District Court which denied the motion for reconsideration or, alternatively, to open the judgment and take additional testimony.

Reasons for Granting the Writ

I.

Petitioner's motion for reconsideration, or alternatively, to open the judgment and take additional testimony, should have been granted.

A. The Decision of the Trial Court, Affirmed by the Court of Appeals, that the Petitioner is Entitled to Relief under either Implied Contract or Quasi-Contract and in Either Case He had Shown that He is Entitled to Reasonable Compensation for his Services, but Nevertheless Judgment Should be Entered for Defendant, is Inconsistent and Erroneous.

The trial court, as a matter of fact and conclusion of law, stated that on the basis of either implied contract with respondent or quasi-contract to prevent unjust enrichment of respondent, petitioner had "shown that he is entitled to reasonable compensation for his services." Despite that find and ruling, the trial court then proceeded to deny petitioner any compensation and awarded judgment to defendant.

This extraordinary result was reached, even though the record contains many indicia of the worth of the petitioner's unique and valuable services, such as the general earning power of petitioner and the worth of his services as indicated by agreements with various other companies, the sharp rise in the value of respondent's own stock on the announcement that Mr. Wilson had accepted the trusteeship, and the fact that respondent had agreed that the trustee could expend from $20,000,000 to $30,000,000 of the ultimate recovery for the payment of claims against respondent, including petitioner's claim. The primary reason, however, for the District Court's bizarre ruling, that although petitioner was entitled to reasonable compensation for his services no compensation would be allowed to him, was that the District Court, in seeking

certainty and specificity with respect to proof as to the value of his services, misconstrued the federal rule as to damages.

In *Hetzel* v. *Baltimore & Ohio Railroad Company,* 169 U.S. 26, the court said, at page 37:

> "Of course, in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages."

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, the court, at page 379, quoted the lower court in the case which had said, "Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate" and then said, "This, we think, was a correct statement of the applicable rules of law."

In *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 220, the court said, at page 265, "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565; and see also Palmer v. Connecticut Railway Co., 311 U.S. 544, 559, and cases cited."

The same principles have been laid down and followed by U.S. Courts of Appeals. In *General Finance Corp.* v. *Dillon,* 172 F 2d 924, the Court of Appeals for the Tenth Circuit said, at page 930:

> "But when a breach of contractual obligation with resulting damage has once been established, the mere

uncertainty as to the exact amount of damages will not preclude the right to a recovery. In such cases it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result may be only approximate."

In *Specialty Assembling & Packing Co.* v. *United States*, 355 F 2d 554, at page 572, the Court of Claims said:

"However, this inability to determine the precise amount of the damages attributable to the Government's breach of contract does not preclude the court from entering a judgment for the plaintiff. The ascertainment of damages is not an exact science. Western Contracting Corp. v. United States, 144 Ct. Cl. 318, 320 (1958). Hence it is not essential that the amount of damages be ascertainable with absolute exactness or mathematical precision. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379; Brand Investment Co. v. United States, 58 F Supp. 749, cert. denied, 324 U.S. 850. It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation. Hedrick v. Perry, 102 F. 2d 842, 807. In estimating damages, the Court of Claims occupies the position of a jury under like circumstances; and all that the litigants have any right to expect is the exercise of the court's best judgment upon the basis of the evidence provided by the parties. United States v. Smith, 94 U.S. 214, 219."

B. The Petitioner Should Have Been Allowed to Submit Additional Proof as to the Amount of Damages.

Rule 59(a) of the Federal Rules of Civil Procedure provides that on a motion for a new trial in an action tried without a jury, the court may change the judgment, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Petitioner was entitled to this relief and it was an abuse of discretion to deny his motion for reconsideration or, alternatively, to open the judgment and take additional testimony. The inconsistent decision of the trial court, referred to above, caught petitioner by surprise. He fully expected that the trial court would find that there was an express contract whereby he was to receive 5% of the amount of the recovery of respondent in the settlement of its suit against the United States. Manifest injustice will result if petitioner is now barred from any recovery for the valuable services he rendered to respondent on the technical basis of failure of proof of the value of those services.

The case had been tried without a jury and had been adjourned from time to time during the course of the trial, so that there was no overwhelming need, or any need at all, to proceed with the immediate and final disposition of the case.

In the interests of justice, the petitioner's motion should have been granted and in the interests of justice the matter should be remanded to the District Court to allow petitioner to present further proof as to the value of the services which the trial court has already found that he rendered.

This is no ordinary case. It involves one of the most complicated combinations of litigation and industrial and financial complexities in history—the GAF takeover, the long and involved contest for its reacquisition, the disposition of the Swiss owned stock among the members of the American public, and the division of the proceeds between the government, the owners of the vested stock and other claimants. Petitioner was in the mainstream of this entire affair for years. To quote from the opinion of the trial court, "No one contends that plaintiff (petitioner) was not well versed in all phases of the Interhandel controversy" and, when Mr. Charles E. Wilson, who had been

considering accepting the trusteeship suggested by petitioner, insisted upon being convinced of the validity of the Swiss claim, "This plaintiff (petitioner) attempted to do. Plaintiff (petitioner) gave extensively of his time and energies. He spent many hours providing background information on the entire Interhandel controversy and the various Swiss personalities involved."

Just as this court granted certiorari in such cases as *International Terminal Operating Co.* v. *N. V. Nedrl. Amerik,* 393 U.S. 74, in an ordinary civil case between a shipowner and a stevedoring company, because this court felt that an issue of fact should have been left to a jury's determination, and also granted certiorari and remanded for further proceedings in the district court in *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens,* 394 U.S. 700, because of disagreement as to factual questions as passed on by the district court, certiorari should be granted in the instant case for the reasons hereinabove expressed and in the interests of justice.

CONCLUSION

This case presents an important issue with respect to the exercise of discretion by the District Court in denying an application to reopen a judgment for the submission of additional proof and where justice will be denied unless petitioner is afforded an opportunity to submit further proof as to the value of services rendered which the trial court has already found that he rendered.

Respectfully submitted,

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Harwood Building
Scarsdale, New York 10583

June, 1972.

APPENDIX

Opinion

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-67

ROBERT A. SCHMITZ

Plaintiff

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A.

Defendant

MR. ROSS O'DONOGHUE, MR. GEORGE A. FISHER, O'Donoghue & O'Donoghue, for Plaintiff

MR. JOHN J. WILSON, MR. FRANK H. STRICKLER, Whiteford, Hart, Carmody & Wilson, for Defendant

Plaintiff, Robert A. Schmitz, seeks compensation for services rendered defendant corporation, Societe Internationale Pour Participations Industrielles et Commerciales, S.A. (hereinafter Interhandel).

Plaintiff's complaint and pre-trial statement listed two counts. The first was for services rendered as a "finder" who procured Mr. Charles E. Wilson to act as agent for Interhandel. The second was for services rendered to Interhandel after Mr. Wilson consented to represent Interhandel.

At trial, plaintiff announced that he would proceed only with Count 1, that is, for compensation for procuring the services of Mr. Wilson. Only this is before the court.

Opinion.

The case was tried by the court, the parties having waived jury trial.

Preliminarily, the court finds the following:

A. This suit is not barred by the Statute of Limitations.[1] The fund out of which plaintiff claims he was to be paid became available in April, 1965. Suit was timely commenced January 10, 1967.

B. Under the ruling in *Kelberine* v. *Societe Internationale, Etc.*, 124 U.S. App. D.C. 257, 261-262, 363 F.2d 989, 993-994 (1966), *cert. den.* 385 U.S. 989, this court has jurisdiction of the defendant corporation by virtue of service of process on its agent, Mr. John J. Wilson.

Plaintiff seeks recovery on an alleged express oral contract or for equitable relief through the imposition of an equitable lien on a fund in the sum of $121,000,000.00.

The case was tried in such a manner that relief would be proper[2] under any of three theories:

1. Express contract;
2. Implied contract to pay a reasonable compensation; or
3. Relief in quasi-contract to prevent unjust enrichment of the defendant.

HISTORICAL BACKGROUND

The controversy which is the basis of this suit has been before the District of Columbia courts many times since 1948. While it is unnecessary to retell all its colorful history, some background must be provided to properly consider plaintiff's claim for compensation.

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[1] 12 D.C.Code, Sec. 301 (1967 ed.).

[2] Cf. Fed.R.Civ.P. 15(b).

In 1941, just prior to America's entry into World War II, Interhandel, a Swiss corporation, owned 90% of the stock of the American corporation, General Aniline & Film Corporation (hereinafter GAF).

On February 16, 1942, under the authority of the Trading with the Enemy Act of 1917,[3] the Secretaary of the Treasury seized all of Interhandel's GAF holdings on the theory that Interhandel was in fact a front for I.G. Farbenindustrie, A.G., a German corporation, and, therefore, the GAF stock was really enemy controlled.

After the war, there were several fruitless diplomatic attempts by Interhandel to regain its holdings in GAF.

Then, in 1948, Interhandel brought suit[4] in this court under section 9(a) of the Trading with the Enemy Act, seeking return of the vested GAF shares. From the start, the litigation was ensnarled in myriad procedural difficulties. The case traveled up and down the judicial ladder of appeal.[5]

Finally, in 1958, ten years after the suit was filed, the United States Supreme Court[6] cleared up the procedural problems, reinstated the cause of action, and finally gave Interhandel an opportunity to be heard on the merits.

And yet, even then, because of the extreme complexity of the case, and because over 300,000 documents, which had been produced by defendant via discovery proceed-

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[3] 50 U.S.C. Appx. 5(b).

[4] Civil Action No. 4360-48.

[5] 86 U.S. App. D.C. 157, 180 F.2d 406 (1950).
88 U.S. App. D.C. 296, 188 F.2d 1017 (1951), *rev.* 343 U.S. 156 (1952).
96 U.S. App. D.C. 232, 225 F.2d 532 (1955), *cert. den.* 350 U.S. 937 (1956).
100 U.S. App. D.C. 148, 243 F.2d 254 (1957), *rev.* 357 U.S. 197 (1958).

[6] *Societe Internationale Etc.* v. *Rogers* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255.

ings, had yet to be examined, the case was by no means ready for trial.

Dr. Hans Sturzenegger, a close friend of the plaintiff, was in control of Interhandel until 1958, when he resigned his directorship and relinquished his control to three leading Swiss banks—Union Bank, Credit Suisse, and Swiss Bank Corporation. In June, 1959, Dr. Sturzenegger sold most of his stock to Union Bank.

By reason of its acquisition of this stock, Union Bank assumed a prominent role in the management of Interhandel. The Chief General Manager of Union Bank, Dr. Alfred Schaefer, became head of Interhandel.

Prior to 1958, there had been attempts by various American corporations—such as W. R. Grace Co., Bell & Howell, Foof Machinery and Chemical Corporation—to acquire ownership of GAF.

In 1958, the idea of settling the Interhandel controversy by negotiation directly with the United States Government became both more desirable and more feasible.

Although the details were by no means clear, Dr. Sturzenegger, his attorney, Dr. Hugo Frey, and the plaintiff considered obtaining the services of some highly reputed American to act as an intermediary between the Swiss principals and the United States Government. The name of Mr. Charles E. Wilson was suggested by the plaintiff.

Mr. Charles E. Wilson had had a long and distinguished career in both government and business in the United States.

He was formerly the President of General Electric Corporation, Chairman of the Board of W. R. Grace Co., and a member of the Board of Directors of Morgan Guaranty and Trust Company in New York. He had previously served under President Franklin D. Roosevelt as Executive Vice-chairman of the War Production Board, and under President Truman as the Defense Mobilizer during

the Korean War. In 1958-59, he was serving as the Chairman of the People to People Foundation.

Plaintiff's activities concerning the acquisition of the services of Mr. Wilson will be examined in detail later. For now, suffice it to say that the possibility of Mr. Wilson's serving as an intermediator or "trustee" for the Swiss was broached to him by the plaintiff in 1958 and early 1959.

There was a short hiatus in the dealings with Mr. Wilson when Dr. Sturzenegger divested himself of control of Interhandel. However, activities were renewed with the new head of Interhandel, Dr. Alfred Schaefer, in October, 1959.

Plaintiff claims that on October 26, 1959, Dr. Schaefer, as head of Interhandel, expressly offered plaintiff 5% of any amount recovered by Interhandel from a settlement with the United States Government on condition that plaintiff procure the services of Mr. Charles E. Wilson to act as Interhandel's "trustee" or agent in dealing with the United States Government. It is on this alleged promise that plaintiff bases this lawsuit.

On April 29, 1960, Mr. Charles E. Wilson, his attorney, Mr. Charles Spofford of New York, Dr. Alfred Schaefer, his attorney, Dr. Wehrli, and the plaintiff met to consider Mr. Wilson's willingness to act on behalf of the Swiss.

The Swiss proposed to name Mr. Wilson as their sole and exclusive agent (called a trustee) in dealing with the United States Government concerning the GAF shares. Mr. Wilson was to have an unlimited, irrevocable power of attorney concerning Interhandel's interest in GAF.

On May 23, 1960, Mr. Wilson agreed to accept these broad powers.

Mr. Wilson and his attorney, Mr. Spofford, began the task of convincing the United States Government—spe-

cifically the Department of Justice—that this long, seemingly interminable, case should be settled out of court.

The evidence is not clear as to the extent of the negotiations between Mr. Wilson and Mr. Spofford on the one hand, and the Department of Justice on the other, although it is clear that contact was made with the Department and possible settlement arrangements were discussed, but without finality.

The November 1960 Presidential election had a crucial effect on negotiations. It became clear to Mr. Wilson that further negotiation with the outgoing Republican Administration would prove fruitless. Serious negotiations could not resume until the new Democratic Administration—specifically the new Justice Department—had familiarized itself with the case.

Discussions with the Department of Justice were resumed during the summer of 1961 but without any agreement being reached.

It was during the summer of 1961 that Dr. Schaefer and the other Swiss principals became exceedingly restless. The trustee had not delivered the expected early end to the dispute. The change of administration seemed, to Dr. Schaefer anyway, to have greatly reduced the effectiveness of Mr. Wilson.

Therefore, Dr. Schaefer attempted to deal directly with the new Attorney General, Mr. Robert F. Kennedy. After several vain attempts, a meeting between Mr. Kennedy and Dr. Schaefer was held in late October, 1961.

Although it was understood that it would take several years to work out the details, Mr. Kennedy and Dr. Schaefer basically agreed that a settlement on a 50-50 basis was most feasible.

After Dr. Schaefer's direct negotiations with Mr. Kennedy, Mr. Wilson expressed a willingness to withdraw completely as trustee. From the October, 1961 meeting between

Mr. Kennedy and Dr. Schaefer, Mr. Wilson ceased to participate in any negotiations concerning Interhandel. In March, 1963, he formally terminated his trusteeship.

On December 20, 1963, a Stipulation of Settlement was signed by Attorney General Kennedy and Mr. John J. Wilson, the attorney of record in the original civil action.

After protracted proceedings in this court concerning the settlement and the status of various intervenors, a sale of the GAF shares was effectuated by the Attorney General in April, 1965. Interhandel's net share of the proceeds was $121,000,000.00. It is from this recovery that plaintiff seeks compensation.

Plaintiff contends that, except for the intervention of Dr. Schaefer, Mr. Charles E. Wilson would have been able to negotiate a disposition of the matter at least as favorable, and possibly more favorable to Interhandel, than that which was the result of the intervention of Dr. Schaefer with the Attorney General.

This obviously is pure speculation. No agreement had been reached during the period when Mr. Charles E. Wilson and his attorney, Mr. Spofford, were actively engaged and the record is devoid of any evidence from which a determination can be made of the part which their efforts contributed to the ultimate result which was accomplished.

Of course, there is no claim by Mr. Wilson for compensation for his services, he having expressly stipulated that he would not accept any fee. As explicitly provided in the original agreement naming Mr. Wilson as Interhandel's agent, Mr. Spofford, as Mr. Wilson's attorney, was paid in full the amount of his fee which was not questioned by Interhandel.

Background of the Plaintiff

Plaintiff was well informed concerning the history of Interhandel. His father, Dietrich A. Schmitz, served as

President of American I.G. Chemical Corporation, which was merged with Ansco Corporation in 1939 to form GAF. Dietrich A. Schmitz served as President of GAF until the 1942 vesting order.

Plaintiff was the nephew of Hermann Schmitz who had formed I.G. Chemical Corporation—the predecessor of Interhandel. Plaintiff was also the nephew of Dr. Albert Gadow who, at one time, was the General Manager of Interhandel. Also, plaintiff had a very close friendship with Dr. Hans Sturzenegger who had virtual control of Interhandel from 1940 to 1958.

No one contends that plaintiff was not well versed in all phases of the Interhandel controversy.

Because of his expertise, plaintiff had been employed by several American corporations relative to the possible purchase of GAF stock. In the early 1950s, plaintiff was employed by Remington Rand as their representative in seeking acquisition of GAF. Thereafter, plaintiff was employed by W. R. Grace Co. from August, 1953, through May, 1956, as a consultant in connection with its efforts to acquire GAF.

In 1958, plaintiff (as an emissary of Food Machinery & Chemical Corporation) approached Dr. Sturzenegger concerning a sale of GAF. Other corporations, including Shields & Co., National Lead Company, and General Dynamics Corporation, also made overtures to plaintiff concerning employment related to Interhandel and GAF.

Express Contract

In this suit plaintiff places most of his emphasis on the theory of express contract.

As heretofore stated, plaintiff claims that, on October 26, 1959, Dr. Schaefer, the chief Director of Interhandel, orally promised him 5% of the value of any proceeds In-

terhandel might obtain in a settlement with the United States Government on condition that the plaintiff procure the services of Mr. Charles E. Wilson as trustee for Interhandel. Plaintiff claims he had a vested right to the 5% commission at the moment Charles E. Wilson accepted the trusteeship in May, 1960, regardless of the means by which a settlement was accomplished, but that actual payment would of necessity be delayed until the settlement fund actually became available.

Only the plaintiff and Dr. Schaefer were present when the alleged oral promise was made. Plaintiff insists that there was such an agreement; Dr. Schaefer is equally adamant in opposition. In this posture, the court must look for evidence which corroborates either the plaintiff or Dr. Schaefer.

After hearing fourteen days of testimony during which several hundred documents were introduced in evidence, and after having the benefit of thorough oral argument, the court is of the opinion that the plaintiff has failed to prove by a preponderance of the evidence that there was an express oral contract for a 5% commission or any commission for procuring the services of Mr. Charles E. Wilson.

1. The alleged contract was not in writing. The court realizes that it was not necessary that such a contract be in writing. Yet, careful business men (in which group both the plaintiff and Dr. Schaefer belong) invariably memorialize their agreements in writing. This would be the case especially when millions of dollars were at stake. Lack of a writing, in this situation, raises a serious question as to the existence of such an agreement.

2. Plaintiff contends that the extreme secrecy surrounding te entire Interhandel affair precluded any writing. This is highly questionable. In spite of the alleged secrecy,

there was prolific correspondence between the plaintiff and Dr. Schaefer on many topics. A simple writing between the parties would not have destroyed the needed secrecy.

Surely, after Mr. Wilson's acceptance of the trusteeship became public, in May, 1960, there was no need for secrecy.

Also, it is noteworthy that all of plaintiff's agency agreements with American corporations from 1950 to 1958 had been in writing.

3. It was not until January 17, 1962 (almost 20 months after Mr. Wilson's acceptance of the trusteeship, and more than 26 months after the alleged promise was made, and well after Mr. Wilson's activities had ended), that the plaintiff, in writing, alluded specifically to the alleged 5% agreement.

For one to wait so long, after what is alleged to have been a very specific promise, before specifically referring to that promise, seems unusual.

4. Plaintiff was compensated, at $2,000.00 per month, for services rendered Interhandel *after* Mr. Wilson accepted the trusteeship. This compensation continued from June 1, 1960 through December 31, 1961. In some of the plaintiff's correspondence with Dr. Schaefer concerning this compensation, he made vague, general statements about his "capital interest" in the eventual settlement. Such vague statements are not those of a man who has received a firm promise of a 5% commission.

5. The testimony conclusively showed that no one else had ever heard of the 5% agreement until plaintiff's January 17, 1962 letter. Even Mr. Charles E. Wilson, the trustee, who was one of plaintiff's main witnesses, admitted that the plaintiff never specifically told him that plaintiff was entitled to the 5% commission at the moment Mr. Wilson accepted the trusteeship.

6. In plaintiff's letter of July 13, 1960 (9 months after the alleged promise had been made) to Dr. Sturzenegger the following appears concerning plaintiff's compensation:

> (Dr. Frey) . . . appeared inordinately concerned about my personal welfare and affairs, and seemed worried that, whereas had this matter eventuated in 1958-1959, I would have been assured good treatment, on the other hand, perhaps Schaefer and Union Bank would be otherwise. I told him that, *although I had no deal, I was not primarily concerned here at the moment,* but that there was a job to be done, independently, by an independent trusteeship, for the good all around to end this sad case properly. Enough said here. (Emphasis added)

If plaintiff had a firm promise for a 5% commission in October, 1959, it is highly unusual that he should tell his close confidant in July, 1960 that he had "no deal" and was not "primarily concerned" with a deal but with getting the job done.

7. As shown above, plaintiff's family was very deeply involved in Interhandel's history. Plaintiff, time and again, claimed that his primary concern was to force the United States Government to correct what he considered to be a grievous injustice to his family and to the Swiss. Such evidence shows the existence of motives other than monetary for plaintiff's actions.

8. Plaintiff claims that he was offered the 5% commission if he could convince Mr. Charles E. Wilson to act as Interhandel's agent. To be sure, the whole Interhandel affair was unique and unprecedented. Such situations do require something more than the usual mode of operating. And yet, it strains credulity to believe that such a large commission was offered to do so little.

The idea of a trusteeship had been broached to Mr. Charles E. Wilson at least ten months prior to plaintiff's October, 1959 meeting with Dr. Schaefer. It is true that Mr. Wilson had not accepted the trusteeship in October, 1959, yet he had been considering it for some time. He insisted on being convinced of the validity of the Swiss claim. This plaintiff attempted to do. Plaintiff gave extensively of his time and energies. He spent many hours providing background information on the entire Interhandel controversy and the various Swiss personalities involved.

Mr. Wilson also made it clear that he would not act for the Swiss unless his own government gave at least tacit approval.

All of this had transpired prior to plaintiff's October, 1959 meeting. While it cannot be said that Mr. Wilson was totally committed to accepting the trusteeship in October, 1959, it also cannot be said that the idea was totally foreign to him. In other words, after October, 1959, it is highly questionable whether plaintiff had to do much convincing of Mr. Charles E. Wilson.

9. Prior to this, plaintiff had received generous offers from various American corporations to act as their agent in procuring GAF assets. But the largest offer was for $900,000.00 from Shields & Co. if plaintiff's negotiations with Interhandel brought about a sale of GAF.

It is not reasonable that plaintiff should be offered over $6,000,000.00 (5% on the $121,000,000.00 settlement) for his activity as a *finder* of an agent when he was offered $900,000.00 by another corporation for his activity as the *primary agent* and primary negotiator in securing GAF assets.

In sum, the court is convinced that there is no evidence —except plaintiff's *ipse dixit*—of the existence of an express oral contract to pay a 5% commission. Plaintiff has failed to prove an express contract.

Opinion.

RELIEF ON AN IMPLIED CONTRACT OR IN QUASI-CONTRACT

Failure to recover on an express contract does not preclude recovery on an implied contract or in quasi-contract. In a case like the one at bar, where one renders services at the request of another, with the expectation of compensation, and in the process, confers a benefit on another, something in the nature of an implied contract results. *Hill* v. *Waxberg,* 237 F.2d 936 (9th Cir. 1956); *U.S.* v. *Alpha-Continental, et al.,* 273 F.Supp. 758, 775 (E.D. N.C. 1967); *St. Louis Testing Lab., Inc.* v. *Mississippi Valley Structural Steel Co.,* 254 F.Supp. 47, 55 (E.D.Mo. 1966), *aff'd* 375 F.2d 565 (8th Cir. 1967); 1 Williston, *Contracts,* Sec. 36 (3rd ed. 1957).

The law recognizes an obligation of the employer to pay reasonable compensation for these services. *Woodruff* v. *New State Ice Co.,* 197 F.2d 36, 38 (10th Cir. 1952); *In re Moyer,* 190 F.Supp. 867, 873 (W.D.Va. 1960); *T. O. Metcalf Co.* v. *Crossroads, Inc.,* 121 Vt. 147, 151 A.2d 307, 311 (1959); 98 *C.J.S.,* Work & Labor, Sections 65, 66(2) (1957).

Cases which enunciate such principles often use either an implied contract or a quasi-contract as the vehicle for providing relief. Often courts are rather inexact in defining whether an implied contract exists or whether plaintiff is entitled to relief on a quasi-contract to prevent unjust enrichment. 3 Corbin, *Contracts,* Sec. 566 (1960).

It is certainly reasonable for the court to find that the facts of this case entitle plaintiff to relief on either theory. On either theory, plaintiff has shown that he is entitled to reasonable compensation for his services.

As was pointed out in *Hill* v. *Waxberg, supra,* at p. 939:

> While the distinction (between an implied contract and a quasi contract) may be somewhat doctrinaire, the application of certain formalized distinctions is

necessary in order to arrive at the proper measure of damages.

If a true contract of employment exists, the measure of damages is the usual compensatory scheme of contract damages which is measured by the compensation usually paid in the community for those services. If relief is truly in quasi-contract, the employer is required to pay compensation for the benefit he has received.

While there are technical differences between the implied contract measure of damages and the quasi-contract measure, in suits for compensation, these different formula produce the same results.[7] The employer is required to pay compensation equal to the reasonable value of the services rendered.

It is up to the court as fact-finder to determine what is the reasonable value of the plaintiff's services to defendant. However, it is axiomatic that the fact-finder cannot decide an issue unless there exists some evidence at trial on that issue. There must be something introduced in evidence upon which the fact-finder can base a verdict. Speculation cannot supply the place of proof. *Moore* v. *Chesapeake & Ohio Railroad Co.,* 340 U.S. 573, 578, 71 S.Ct. 428, 430, 95 L.Ed. 547, 550-551 (1951); *Controller of California* v. *Lockwood,* 193 F.2d 169, 172 (9th Cir. 1951); *McNamara* v. *American Motors Corp.,* 247 F.2d 445, 450 (5th Cir. 1957).

In the case at bar, the issue which the court must determine concerns the reasonable compensation to which plaintiff is entitled for the services he performed for defendant.

When there has been no evidence as to the reasonable value of plaintiff's services, the fact-finder has nothing upon which to base its verdict—except sheer speculation.

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[7] Cf. Costigan, Implied-in-Fact Contracts, 33 *Harv.L.Rev.* 376, 383 (1920).

In a suit for compensation for services rendered, there can be no recovery unless there has been some evidence of the reasonable value of plaintiff's services.

As was said in *Sullivan* v. *District of Columbia Paper Mills,* 67 R.I. 330, 23 A.2d 765, 767-768 (1941):

> Assuming that the plaintiff performed some such services, we find in the record before us no evidence showing their reasonable value. If the plaintiff is attempting, under the common counts, to recover compensation for such services from the defendant, he has the usual burden of proof, as part of his case, to establish by competent evidence their reasonable value . . . There is no direct evidence as to the reasonable value of these services. Any finding by us as to such value would, therefore, be based on conjecture.

Failure to establish the reasonable value of plaintiff's services in a suit for compensation based on implied contract or on quasi-contract is fatal to recovery. The authorities on this point are unanimous. E.g., *Grau* v. *Mitchell,* 156 Colo. 111, 397 P.2d 488, 489-490 (1964); *T. O. Metcalf Company* v. *Crossroads, Inc.,* 121 Vt. 147, 151 A.2d 307, 311 (1959); *Bianco* v. *Floatex, Inc.,* 145 Conn. 523, 144 A.2d 310, 312 (1958); *D'Avanzo* v. *Shreveport Restaurants, Inc.,* 71 So.2d 698, 699 (La.App. 1954); *Reeves* v. *Vallow,* 95 P.2d 945, 946 (Cal.App. 1939); *Automatic Sprinkler Corporation of America* v. *Ruffner Hotel,* 110 W.Va. 67, 156 S.E. 887 (1931); *Meyer-Kiser Corporation* v. *Dooley,* 100 Fla. 243, 129 So. 592 (1930); *Terry Realty* v. *Noctin,* 220 Ala. 282, 124 So. 901, 903 (1929); *In re Davies Estate,* 289 Pa. 579, 137 A. 728, 731 (1927); *Winch* v. *Warner,* 174 N.Y.S. 819, 822 (App.Div. 1919); *McDaniels* v. *Harrington,* 80 Ore. 628, 157 P. 1068, 1070 (1916); 98 *C.J.S.,* Work & Labor, Sections 57, 65.

Without some evidence as to reasonable value of plaintiff's services, the court simply has no basis for a decision —other than speculation.

Opinion.

In cases where the value of services is of common knowledge, the fact-finder is permitted to establish value from its own knowledge. *Dewald* v. *Norris*, 397 S.W.2d 738, 743 (Mo.App. 1965); 98 *C.J.S.*, Work & Labor, Sec. 57.

These cases involve some very common type of service such as nursing. Certainly the case at bar does not fall within this exception to the general rule.

The court is compelled to deny recovery in the case at bar. There is no evidence as to the value of the plaintiff's services. There was evidence concerning the compensation other corporations were willing to pay the plaintiff for his services as their agent in negotiating a purchase of GAF assets from Interhandel. But this is not evidence of the value of plaintiff's services for defendant as the finder of Mr. Charles E. Wilson. Certainly, services rendered as the prime agent and prime negotiator are materially and substantially different from those for which plaintiff now seeks compensation.

None of the above mentioned evidence concerned the reasonable value of plaintiff's services in procuring the services of Mr. Charles E. Wilson.

Failure to prove the reasonable value of plaintiff's services is fatal to recovery.

Judgment will be entered for defendant.

This Opinion will serve as the court's Findings of Fact and Conclusions of Law.

JOSEPH C. MCGARRAGHY
Judge

May 7, 1970

Order of Affirmance.

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 24,600 (No Opinion)
September Term, 1971

Civil Action No. 85-67

ROBERT A. SCHMITZ, Appellant

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, TAMM and MACKINNON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, and this court being in agreement with the findings of fact and conclusions of law filed by the District Court, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed. *See also* 6A J. MOORE, FEDERAL PRACTICE ¶ 59.07 (1971).

Per Curiam

J.S.W.
E.A.T.
G.E.M.

Order Denying Reconsideration.

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 24,600 September Term, 1971

Civil Action 85-67

ROBERT A. SCHMITZ, Appellant

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., etc.

Before: WRIGHT, TAMM and MACKINNON, Circuit Judges.

ORDER

On consideration of appellant's motion for reconsideration, it is

ORDERED by the Court that appellant's aforesaid motion is denied.

Per Curiam
For the Court:

NATHAN J. PAULSON
Clerk

Circuit Judges Leventhal and Robb did not participate in the foregoing order.